

ON 2/27/2019

By /s/ Mia Marlowe
Deputy Clerk

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10 Attorneys for Plaintiff,
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11 limited liability company

12
13 SUPERIOR COURT OF CALIFORNIA

14 COUNTY OF SAN MATEO

15 SIX4THREE, LLC, a Delaware limited
liability company;

16 Plaintiff,

17 v.

18 FACEBOOK, INC., a Delaware
19 corporation;
MARK ZUCKERBERG, an individual;
20 CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
21 SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
22 ILYA SUKHAR, an individual; and
DOES 1 through 50, inclusive,

23 Defendants.
24
25
26
27
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Case No. CIV 533328

**Assigned for all purposes to
Hon. V. Raymond Swope, Dept.
23**

**DECLARATION OF DAVID S.
GODKIN IN SUPPORT OF
OPPOSITION TO FACEBOOK'S
MOTION TO OPEN DISCOVERY
AND TO COMPEL**

Date: March 15, 2019
Time: 10:00 a.m.

Filing Date: April 10, 2015
Trial Date: April 25, 2019

1 I, David S. Godkin, declare:

2 1. I am a partner at the law firm of Birnbaum & Godkin, LLP, and as of the date
3 hereof am counsel of record for Plaintiff Six4Three, LLC ("643") in this case. My firm's
4 motion to be relieved as counsel is set for hearing on March 13, 2019, and I am filing this
5 Declaration and the Opposition to Facebook's motion to open discovery and to compel in order
6 to preserve 643's rights in advance of being relieved as counsel. I make this Declaration from
7 personal knowledge, and if called to testify, I could and would competently testify thereto.

8 2. Attached hereto as Exhibit 1 is a true and correct copy of relevant pages of the
9 certified transcript from the December 17, 2018 hearing.

10 3. Attached hereto as Exhibit 2 is a true and correct copy of the Court's Order re:
11 Discovery dated January 16, 2019.

12 4. Attached hereto as Exhibit 3 is a true and correct copy of the Individual
13 Defendants' Opposition to Plaintiff's Ex Parte Application for an Order Setting Plaintiff's
14 Motion for Relief from Judgment o September 7, 2018.

15 5. Having been ordered by the Court to comply with 643's document requests,
16 Facebook began its production of documents marked "confidential" and "highly confidential"
17 in December 2016.

18 6. When I learned that Mr. Kramer had disclosed Facebook's confidential
19 documents to the UK Parliament DCMS Committee, I immediately notified the Court and
20 Facebook.

21 7. On January 7, 2019, in compliance with a stipulation agreed to in open court, my
22 firm produced to Facebook our non-privileged correspondence with media and government
23 entities concerning Facebook's Anti-SLAPP motion that Facebook had requested. The bulk of
24 these communications concern communications with media and government entities about
25 filing amicus briefs in support of efforts to unseal Facebook's internal communications.

26 8. The summary of 643's publicly-filed Fifth Amended Complaint that my firm
27 sent to various media and government entities summarizes the complaint's allegations and cites
28 to the Fifth Amended Complaint.

9. Attached hereto as Exhibit 4 is a true and correct copy of a letter dated November 15, 2018 to Facebook's counsel concerning the allegations in the Styleform complaint.

10. Attached hereto as Exhibit 5 is a true and correct copy of relevant pages of Six4Three's Opposition to Facebook's Ex Parte Application, filed on November 28, 2018.

11. My firm has not been authorized by Six4Three to waive any privilege (including, without limitation, attorney-client privilege or work product privilege) with respect to Six4Three's privileged communications.

12. I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed February 20, 2019 at Boston, Massachusetts.


David S. Godkin

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PROOF OF SERVICE

I, Cheryl A. McDuffee, declare:

I am a citizen of the United States and employed in Suffolk County, Massachusetts. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 280 Summer Street, Boston, MA 02210. On February 27, 2019, I served a copy of the within document(s):

DECLARATION OF DAVID S. GODKIN IN SUPPORT OF OPPOSITION TO FACEBOOK'S MOTION TO OPEN DISCOVERY AND TO COMPEL



by electronic service, per the agreement of the parties, by emailing a true and correct copy through counsel's email address to all counsel of record at the email addresses set forth below.

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1 **BY EMAIL AND BY HAND**

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3 Department 23
4 complexcivil@sanmateocourt.org
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6 I declare under penalty of perjury under the laws of the State of California that the above
7 is true and correct.

8 Executed February 27, 2019, at Boston, Massachusetts.

9 
Cheryl A. McDuffee

EXHIBIT 1

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

SIX4THREE, LLC, A DELAWARE LIMITED)
 LIABILITY COMPANY, et al.,) Case No.
) CIV533328

Plaintiffs,)

vs.)

FACEBOOK, INCORPORATED, et al.,)

Defendants.)

**CERTIFIED
TRANSCRIPT**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE V. RAYMOND SWOPE, JUDGE

DEPARTMENT 23

--oOo--

DECEMBER 17, 2018

--oOo--

A P P E A R A N C E S:

For the Plaintiffs: Birnbaum & Godkin
 280 Summer Street
 Boston, Massachusetts 02210

By: DAVID GODKIN, Esq.

Gross & Klein
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By: STUART G. GROSS, Esq.

(Appearances continued on next page:)

Reported by: Megan Zalmi, CSR 10925, CRR

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By: JAMES A. MURPHY, Esq.
JAMES LASSART, Esq.

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San Francisco, California 94105
By: DONALD SULLIVAN, Esq.

For Defendant Facebook: Durie Tangri
217 Leidesdorff Street
San Francisco, California 94111

By: SONAL MEHTA, Esq.
JOSH LERNER, Esq.
LAURA MILLER, Esq.
CATHERINE KIM, Esq.

For Scaramellino and Kramer:
Computer Law Group
401 Florence Street
Palo Alto, California 94301

By: JACK RUSSO, Esq.
CHRISTOPHER SARGENT, Esq.

--oOo--

1 MS. MEHTA: Good morning, Your Honor.
2 Sonal Mehta, Josh Lerner, Laura Miller, Catherine Kim,
3 and Zachary Abrahamson from Durie Tangri for Facebook.
4 And also here are Paul Grewawal, vice-president, deputy
5 general counsel for litigation from Facebook, and
6 Natalie Nagle, associate general counsel for litigation
7 at Facebook.

8 THE COURT: Good morning. I am going to have
9 to make a disclosure. I don't think it's really that
10 necessary, but I am going to do it, nevertheless.

11 I used to work for Mr. Sullivan's firm nearly
12 30 years ago at Wilson, Elser, Moskowitz, Edelman &
13 Dicker in San Francisco. I also used to work with
14 Mr. Lassart at Ropers, Majeski, Kohn & Bentley over 20
15 years ago. Any connections or affiliations are long
16 past, and I hope that the parties will appreciate the
17 disclosure.

18 And if there's no objection, we'll go forward.

19 All right. I just mentioned that in an
20 abundance of caution.

21 This court has taken considerable time without
22 the pressure of a briefing schedule and has looked at
23 this over the weekend. And the court has reflected on
24 the matters that have occurred in the recent weeks with
25 regard to the violation of the court order and the
26 subsequent release by the House of Commons and so forth.

1 And the court has, therefore, reconsidered certain
2 orders it has previously issued with regard to the
3 matters that are pressing. Therefore, in particular,
4 the order reopening discovery for the limited purpose of
5 investigating the breach of the court orders is vacated.

6 The reason for this is that I agree with
7 Mr. Russo and, essentially, the inferences raised by
8 Facebook, that there may be sufficient information to
9 serve as a basis for a motion for terminating sanctions
10 and for an application for order to show cause re:
11 Contempt that's been issued by the parties.

12 Accordingly, the court is ordering the
13 following: The forensic examiner should preserve and
14 maintain the custody of the data collected pursuant to
15 the court order.

16 The court orders preservation of that data,
17 and nothing shall be disclosed to any of the parties
18 until further order of the Court.

19 The forensic examiner shall not run any search
20 terms at all, unless necessary for the preservation of
21 the data, and such preservation, or necessity, shall
22 only be pursuant to a court order.

23 Second, the court will not appoint a
24 third-party discovery referee, nor will the court
25 appoint a discovery referee for depositions.

26 The court further orders that there shall be

1 no depositions of lawyers in this case until further
2 order of the Court, and there shall be no depositions of
3 Mr. Kramer or Mr. Scaramellino until further court
4 order.

5 This court believes that it is improper to
6 compel attorneys to be subjected to deposition in view
7 of the attorney-client privilege and the attorney work
8 product doctrine protections.

9 In the absence of any further briefing on the
10 motions and without the establishment of the two-step
11 showing that is necessary under
12 Evidence Code Section 956, that two-step showing, the
13 prima facie case and the reasonable relationship between
14 the communication and the crime of fraud has not been
15 established, and we're not there.

16 The deposition of Mr. Scaramellino shall not
17 go forward because he's in a bit of a gray area. Number
18 one, he is a member of the legal team, and, presumably,
19 everything that he would do would be imputed to the law
20 firms that he works for; and, second, he's also an
21 investor in Six4Three. So the deposition of Mr. Kramer
22 shall not go forward, either, as I had said at the
23 outset with the suspension of the discovery order having
24 been made.

25 Now, Facebook has previously sought an
26 expedited briefing on terminating sanctions and

1 contempt, which skips a number of procedural steps.
2 This is improper. Therefore, if it chooses to do so,
3 Facebook, may file its noticed motion for terminating
4 sanctions pursuant to Code of Civil Procedure Section
5 2023.030, with the ordinary briefing schedule pursuant
6 to Code of Civil Procedure Section 1005(b).

7 Further, if it elects to do so, Facebook may
8 make an application for an order to show cause re:
9 Contempt with a properly prepared application and
10 affidavit pursuant to Code of Civil Procedure
11 Sections 1211 and 1211.5, pursuant to
12 Code of Civil Procedure Section 1005(b) upon personal
13 service as is required for any contempt citations, if
14 Facebook elects to do so.

15 With regard to the certification of
16 destruction, Facebook needs to serve the notice of entry
17 of order regarding the return and/or destruction of
18 confidential documents in order for that 48-hour period
19 to begin.

20 MS. MEHTA: That was done on Friday,
21 Your Honor.

22 THE COURT: Very well.

23 The motions for attorneys' fees shall go
24 forward on January 11th, 2019, at nine o'clock a.m.

25 Facebook shall prepare the order based upon
26 what I've just announced on the record.

1 this order.

2 MS. MEHTA: Yes, Your Honor.

3 THE COURT: Is everything clear? Or do I need
4 to restate anything?

5 MR. LERNER: It is clear.

6 If I could be heard to clarify, if I can, or
7 perhaps just clear up my own confusion on the discovery
8 point. I would love minute --

9 THE COURT: There's no discovery. It's done.
10 I don't want to talk about discovery anymore because I
11 have vacated my discovery order. The information
12 collected thereby is frozen and shall be not accessible
13 by any party until further court order.

14 MR. LERNER: Understood.

15 THE COURT: Yes.

16 MR. LERNER: And I think it's no doubt
17 probably on me that I had brought up earlier, for
18 example, the waiver and those things. And the reason I
19 brought that up is that we had asked, based on the
20 ruling at the last hearing, that the parties should, or
21 could, seek expedited briefing, as various people have
22 on issues. We asked for expedited briefing on this
23 question about privilege.

24 And so what I wanted to clarify, as I
25 understand that right now Your Honor is saying, the
26 previous issues that we discussed with respect to search

EXHIBIT 2

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Attorneys for Defendant
Facebook, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23

ORDER RE: DISCOVERY

Date: Dec. 17, 2018
Time: 9:00 a.m.
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

FILED
SAN MATEO COUNTY

JAN 17 2019

Clerk of the Superior Court
By  DEPUTY CLERK



1 On December 17, 2018, all parties appeared in Department 23 for a discovery conference.

2 On December 7, 2018, the Court reopened "discovery for the limited purpose of Plaintiff, Plaintiff's
3 counsel David Godkin, Stuart Gross and law clerk Thomas Scaramellino, and Plaintiff principal Theodore
4 Kramer's disclosure, dissemination, distribution and/or destruction, or attempt thereto, of Defendant
5 Facebook, Inc.'s confidential and highly confidential documents and violation of the Court's orders." Case
6 Management Order No. 17 at 2 (Dec. 7, 2018). The Court *sua sponte* VACATES the re-opening of
7 discovery as follows:

8 Plaintiff Six4Three, LLC's lawyers shall not be deposed absent further order of the Court. Mr.
9 Kramer and Mr. Scaramellino shall not be deposed absent further order of the Court.

10 The Court will not appoint a third-party discovery referee or a referee for any depositions at this
11 juncture.

12 The Forensic Examiner shall continue to preserve and maintain custody of the data it has collected
13 pursuant to the Court's prior orders. The Forensic Examiner shall not disclose any of the data it has
14 collected and preserved until further order of the Court. The Forensic Examiner shall not apply any search
15 terms to the data it has collected and preserved unless it is necessary for the continued preservation of the
16 data. Such application of search terms or necessity shall only be pursuant to an order of the Court.

17 Defendant Facebook, Inc. has previously sought an expedited briefing schedule regarding
18 terminating sanctions and contempt. This request is DENIED as procedurally improper. Facebook may,
19 however, file a notice for terminating sanctions pursuant to Code of Civil Procedure section 2023.030 with
20 an ordinary briefing schedule pursuant to Code of Civil Procedure section 1005, subdivision (b). Facebook
21 may also make an application for an order to show cause regarding contempt with an application and
22 affidavit pursuant to Code of Civil Procedure sections 1211 and 1211.5, with a briefing schedule pursuant
23 to Code of Civil Procedure section 1005, subdivision (b).

24
25 IT IS SO ORDERED.

26
27 Dated: **JAN 16 2019**

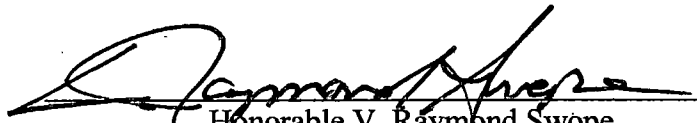
28

Honorable V. Raymond Swope
Judge of the Superior Court of California

EXHIBIT 3

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

**Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23**

**INDIVIDUAL DEFENDANTS' OPPOSITION
TO PLAINTIFF'S EX PARTE APPLICATION
FOR AN ORDER SETTING PLAINTIFF'S
MOTION FOR RELIEF FROM JUDGMENT
TO SEPTEMBER 7, 2018**

Date: August 9, 2018
Time: 2:00 p.m.
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

1 **I. INTRODUCTION**

2 Messrs. Zuckerberg, Cox, Olivan, Lessin, Vernal and Sukhar (“Individual Defendants”) ask the
3 Court to deny Plaintiff Six4Three, LLC’s (“Six4Three”) *ex parte* application for an order accelerating the
4 hearing on Six4Three’s Motion for Relief from Judgment (“Motion”) from November 2, 2018 to
5 September 7, 2018.

6 Although it is styled as a motion for relief from judgment, in reality, the motion is nothing more
7 than an improper request for reconsideration of the Court’s order granting the Individual Defendants’
8 anti-SLAPP motion. The disguised request for reconsideration is procedurally improper because it fails
9 to comply with the requirements of Cal. Civ. Proc. Code § 1008, and is substantively improper because it
10 seeks reconsideration without raising any new facts or new law. On that basis alone, the Court should
11 decline to consider the underlying motion, and Six4Three’s *ex parte* application should be denied as
12 moot.

13 Even if the Court were to consider Six4Three’s misplaced motion on the merits (it should not),
14 Six4Three’s *ex parte* application should still be denied because Cal. Civ. Proc. Code §§ 660 and 663a(b)
15 do not apply, and so there are no exigent circumstances that require *ex parte* relief. The motion can and
16 should be heard on the noticed date and with a normal briefing schedule.

17 Finally, if the Court were to consider Six4Three’s application for an accelerated hearing date
18 notwithstanding the above, the Individual Defendants request that the hearing be scheduled for either
19 September 14, 2018 or September 21, 2018, due to scheduling conflicts.

20 **II. BACKGROUND**

21 On July 16, 2018, the Court granted the Individual Defendants’ anti-SLAPP motion. Declaration
22 of Catherine Y. Kim in Support of Individual Defendants’ Opposition (“Kim Decl.”) ¶ 2. On July 31,
23 2018, Six4Three filed a motion for relief from judgment under Cal. Civ. Proc. Code §§ 657, 663, or 473.
24 *Id.* ¶ 3.

25 **III. ARGUMENT**

26 **A. Six4Three Improperly Ignores Code of Civil Procedure Section 1008.**

27 Six4Three’s Motion is a thinly-veiled motion for reconsideration and should be treated as such.
28 “The name of a motion is not controlling, and, regardless of the name, a motion asking the trial court to

1 decide the same matter previously ruled on is a motion for reconsideration under Code of Civil Procedure
2 section 1008.” *Powell v. Cty. of Orange*, 197 Cal. App. 4th 1573, 1577 (2011); *accord Lennar Homes of*
3 *California, Inc. v. Stephens*, 232 Cal. App. 4th 673, 681 (2014). *See also* Cal. Prac. Guide Civ. Pro.
4 Before Trial Ch. 9(I)-E (“The name of the motion is not controlling. The [motion for reconsideration]
5 requirements [] apply to *any motion that asks the judge to decide the same matter previously ruled on.*”) (emphasis added).

7 Here, each argument advanced by Six4Three’s Motion asks the trial court to reconsider a “matter
8 previously ruled on[.]” *Powell*, 197 Cal. App. 4th at 1577. Specifically:

- 9 • The Court already considered and rejected Six4Three’s argument that Six4Three
10 “properly incorporate[d] by reference arguments” about the commercial speech exception
11 to California’s anti-SLAPP law and about the Communications Decency Act. *Compare*
12 *Kim Decl. Ex. 2 at 2 with id. Ex. 1 at 10–11* (“Plaintiff provides no legal authority to
13 support incorporation of arguments raised in other motions.”).
- 14 • The Court already considered and rejected Six4Three’s commercial speech arguments
15 about the Individual Defendants’ alleged representations about Facebook’s products.
16 *Compare Kim Decl. Ex. 2 at 8 with id. Ex. 1 at 15* (“Plaintiff has failed to meet its burden
17 to demonstrate the activity is commercial speech.”).
- 18 • The Court already considered and rejected Six4Three’s argument that Section 230 of the
19 CDA does not apply to Six4Three’s claims. *Compare Kim Decl. Ex. 2 at 11, 13 with id.*
20 *Ex. 1 at 9* (“In evaluating whether the conduct involves protected activity, ‘We look for
21 the principal thrust or gravamen of the plaintiff’s cause of action.’”) (citation omitted),
22 *and 14* (“Plaintiff failed to raise *any argument* or cite to any legal authority or evidence to
23 demonstrate the CDA does not apply.”) (emphasis added).

24 If Six4Three seeks reconsideration of the Court’s rulings on these issues as it apparently seeks to
25 do, it is incumbent on Six4Three to meet the statutory requirements for such a motion. Section 1008 of
26 California’s Code of Civil Procedure permits reconsideration only upon a showing of “new or different
27 facts, circumstances, or law.” Cal. Civ. Proc. Code § 1008. Where an opinion issues before a challenged
28 ruling and “could therefore have been provided the trial court prior to [the challenged] ruling,” such an
opinion “clearly does not provide the ‘new’ law that authorizes trial court reconsideration of a prior
order.” *Baldwin v. Home Sav. of Am.*, 59 Cal. App. 4th 1192, 1196 (1997).

Six4Three’s Motion identifies no new facts or law. Six4Three first argues that the Court’s
incorporation-by-reference analysis relied “on an erroneous reading [of] CRC 3.1110(d)” and

misinterpreted cases published well before the hearing on the Individual Defendants’ anti-SLAPP motion, *see* Kim Decl. Ex. 2 at 4–5 (quoting *L.A. Unified Sch. Dist. v. Garcia*, 58 Cal. 4th 175, 186 (2013) and *Roth v. Plikaytis*, 15 Cal. App. 5th 283 (2017)). Six4Three then challenges the Court’s commercial speech analysis with arguments drawn solely from *Demetriades v. Yelp, Inc.*, 228 Cal. App. 4th 294, 310 (2014). *See* Kim Decl. Ex. 2 at 8. These cases and court rules predate the Court’s Order and so cannot supply the “new . . . law” required for reconsideration. *Baldwin*, 59 Cal. App. 4th at 1196. Nor does Six4Three draw from these authorities “different” law. Instead, Six4Three submits generic canons of statutory interpretation and directs the Court to a rule whose meaning the Court already considered. *Compare* Kim Decl. Ex. 2 at 4–5 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 101 (2012) and Cal. Rules of Court, rule 3.1110(d)), *with* Kim Decl. Ex. 1 at 11 (“Plaintiff’s reliance on California Rules of Court, rule 3.1110(d) is inapposite.”).

Because it fails to comply with the statutory requirements for a motion for reconsideration under Section 1008, the Court should decline to consider Six4Three’s Motion, and should reject the instant *ex parte* application as requesting relief that is moot.

B. Ex Parte Relief is Unnecessary Because There Are No Exigent Circumstances.

Even if the Court were to consider Six4Three’s Motion, *ex parte* relief is unnecessary because the Court does not have to rule on Six4Three’s Motion within 60 days. Section 660 imposes a 60-day limit only for ruling on motions for new trial. Cal. Civ. Proc. Code § 660. Section 663a(b) similarly imposes a 60-day limit only for ruling on motions to set aside and vacate a judgment. Cal. Civ. Proc. Code § 663a(b). Because, as explained above, Six4Three’s Motion is not a motion for new trial under Section 660 or a motion to set aside and vacate a judgment under Section 663a(b), the 60-day limit does not apply. *Supra* at Section III.A.

Moreover, even if the Motion were actually a motion for relief from judgment under Section 473(b) (as opposed to a motion for reconsideration), Six4Three is wrong that such motions have a 60-day deadline for adjudication. *See* Six4Three’s *Ex Parte* Application at 2 (arguing that Section 663a(b)’s 60-day deadline applies to motions for relief from judgment under Section 473(b)). Six4Three’s reliance on *Shisler v. Sanfer Sport Cars, Inc.*, 167 Cal. App. 4th 1 (2008), is misplaced. *Shisler* only says that Cal. Rules of Court, rule 1.108(c) applies to Section 473(b) motions. 167 Cal. App. 4th at 5 n.2. But Rule

1 1.108(c) does not impose a 60-day deadline for ruling on Section 473(b) motions—Rule 1.108(c) simply
2 extends the deadline to appeal if a party “serves and files a valid notice of intention to move—or a valid
3 motion—to vacate the judgment.” Cal. Rules of Court, rule 1.108(c). In other words, Six4Three has not
4 cited any authority to support its (mis)reading that there is a 60-day deadline for resolution of Section
5 473(b) motions. Thus, even if Six4Three’s Motion were a motion for relief under Section 473(b) (it is
6 not—it is a motion for reconsideration), there would not be a 60-day deadline for the Court to rule on it.
7 There thus are no exigent circumstances that require *ex parte* relief.

8 **C. If the Court Grants Six4Three’s Application, the Individual Defendants Respectfully**
9 **Request that the Hearing Be Scheduled for September 14 or 21.**

10 If the Court finds that *ex parte* relief is appropriate, the Individual Defendants respectfully request
11 that the hearing on Six4Three’s Motion be scheduled for September 14, 2018 or September 21, 2018, due
12 to scheduling conflicts on September 7, 2018. Individual Defendants’ counsel is unavailable on
13 September 7, 2018 due to other commitments, and plans to ask Six4Three and the Court to re-set the
14 hearing currently set for September 7 to either September 14 or 21.


15 **IV. CONCLUSION**

16 The Individual Defendants respectfully request that the Court deny Six4Three’s *ex parte*
17 application, or in the alternative, schedule the hearing on Six4Three’s Motion for September 14, 2018, or
18 September 21, 2018.

19
20 Dated: August 7, 2018

DURIE TANGRI LLP

21
22 By: _____


SONAL N. MEHTA
JOSHUA H. LERNER
LAURA E. MILLER
CATHERINE Y. KIM

23
24 Attorneys for Defendants
25 Facebook, Inc., Mark Zuckerberg, Christopher Cox,
26 Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya
27 Sukhar
28

1 **PROOF OF SERVICE**

2 I am a citizen of the United States and resident of the State of California. I am employed in San
3 Francisco County, State of California, in the office of a member of the bar of this Court, at whose
4 direction the service was made. I am over the age of eighteen years, and not a party to the within action.
5 My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

6 On August 7, 2018, I served the following documents in the manner described below:

7 **INDIVIDUAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S EX PARTE**
8 **APPLICATION FOR AN ORDER SETTING PLAINTIFF'S MOTION FOR RELIEF**
9 **FROM JUDGMENT TO SEPTEMBER 7, 2018**

10 ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through
11 Durie Tangri's electronic mail system from jposada@durietangri.com to the email
12 addresses set forth below.

13 On the following part(ies) in this action:

14 Stuart G. Gross
15 GROSS & KLEIN LLP
16 The Embarcadero, Pier 9, Suite 100
San Francisco, CA 94111
Telephone: 415-671-4628
sgross@grosskleinlaw.com
iatkinsonyoung@grosskleinlaw.com

17 David S. Godkin
18 James Kruzer
19 BIRNBAUM & GODKIN, LLP
20 280 Summer Street
Boston, MA 02210
Telephone: 617-307-6100
godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

21 *Attorneys for Plaintiff*
22 *Six4Three, LLC*

23 I declare under penalty of perjury under the laws of the United States of America that the
24 foregoing is true and correct. Executed on August 7, 2018, at San Francisco, California.

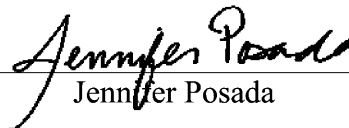
25 
26 Jennifer Posada
27
28

EXHIBIT 4

November 15, 2018

BY EMAILLaura Miller, Esq.
Durie Tangri
217 Leidesdorff Street
San Francisco, CA 94111

Re: Styleform IT v. Facebook, Inc., et al.
California Superior Court, San Francisco County
Case No. CGC 18-571075

Dear Laura:

I write in response to your letter of November 13, 2018 accusing my firm and Mr. Gross's firm of violating the Protective Order in *Six4Three, LLC v. Facebook, Inc., et al.*, Case No. 533328 ("Miller Letter"). We take this accusation extremely seriously, and it is entirely without merit.

Your letter states that the Styleform Complaint relies "extensively on mischaracterizations of the confidential and highly confidential information that Facebook produced through discovery in [the Six4Three action] in direct violation of our Stipulated Protective Order in that case." Miller Letter, at 1. This is false. The allegations of the Styleform Complaint rely entirely on information in the personal knowledge of Styleform and/or information in the public domain. Your accusation that we have "inappropriately shared with Styleform Facebook's confidential and highly confidential documents" is similarly false. At no time did my firm, Mr. Gross's firm or anyone working with our firms produce to Styleform *any* confidential or highly confidential documents provided by Facebook in the Six4Three action. You have no basis for making this serious, unfounded accusation.

As a preliminary matter, the Styleform Complaint tracks the allegations of Six4Three's operative complaint, the Fifth Amended Complaint ("5AC"), filed on January 12, 2018. The complaints use virtually identical language in characterizing Defendants' conduct. The entirety of the 5AC has been public since it was filed. For almost a year now, Facebook has raised *no* concerns regarding potential violations of the Protective Order as a result of the allegations in the 5AC. Nor could Facebook do so in good faith. That Facebook has decided to make these accusations only *after* a new plaintiff has filed a complaint demonstrates quite clearly that this is a bad faith attempt to



intimidate us and our clients. That Facebook makes this accusation with unclean hands is made all the more evident from the examples you claim as “proof”.

You state as proof of your accusation that Styleform alleges “Tinder provided highly valuable unrelated financial consideration, including intellectual property, to Facebook in exchange for its special access to APIs.” Miller Letter, at 2 (Styleform Complaint, ¶ 68). You then contend that “[n]othing in the public domain addresses this alleged transfer of intellectual property from Tinder to Facebook as consideration for special access to APIs—because no such transfer ever occurred.” *Id.* This is false. The 5AC alleges:

The Wall Street Journal also reported in the same article that Facebook reached an unspecified compromise with dating app Tinder that permitted some form of access to photos of mutual friends. Upon information and belief, Tinder provided highly valuable unrelated financial consideration to Facebook in exchange for this special access to data. 5AC, ¶ 167.

Indeed, *The Wall Street Journal*’s reporting of Tinder’s special deal with Facebook was published on September 21, 2015, more than three years ago now.¹ The 5AC further alleges that “Developers were required to share their source code and other **confidential intellectual property** with Facebook at Facebook’s request” and that “the companies who were offered special, whitelist access to the privatized Graph API Data were ones who either agreed to purchase hundreds of thousands of dollars in unrelated mobile ads, were friends of Zuckerberg, Sandberg or other Facebook executives, or provided other valuable consideration, **such as intellectual property or data**, to Facebook.” 5AC, ¶¶, 6, 167.

Your next piece of “evidence” fares no better. You contend that Styleform’s allegation that Facebook paid a public relations firm to “disseminate this fraudulent pro-privacy narrative” relies on confidential materials to mischaracterize the PR firm’s work for Facebook. Miller Letter, at 2 (Styleform Complaint, ¶ 165). Again, the public 5AC undermines your accusation entirely: “Zuckerberg and the Conspiring Facebook Executives directed their public relations team **to feed reporters false information** and in certain cases drafted reporters’ stories themselves in order **to disseminate this fabricated narrative** among the public and Developer community.” 5AC, ¶ 129.

Finally, you contend that confidential information is the “only possible source” for Styleform’s allegation that Facebook executives stopped providing a level competitive playing field for developers in 2009, but concealed this decision from them. Miller Letter, at 3. To conclude that confidential information is the “only possible source” for this allegation requires willful blindness to numerous allegations in the 5AC. The complaint alleges repeatedly that Defendants failed to operate “a level competitive playing field” and “made and directed Facebook employees to make false statements and

¹ See <https://www.wsj.com/articles/facebooks-restrictions-on-user-data-cast-a-long-shadow-1442881332>.



to maliciously suppress material facts from at least 2009 through 2015.” 5AC, ¶¶ 24-27. Further, the 5AC cites numerous material misrepresentations specifically from 2009 as evidence of this claim. 5AC ¶¶ 63-64, 102.

Moreover, Styleform cites public testimony from the deposition of Ali Partovi in the Six4Three action as evidence of this allegation that you remarkably claim can only have been generated from a confidential source. Styleform Complaint ¶ 95-96. Partovi testified that “Facebook’s senior executive in charge of Platform told him in a meeting in 2009 that if iLike did not sell to Facebook for a price much lower than its market value at the time, then Facebook would shut iLike down and destroy its business.” *Id.* Partovi’s testimony, which is clear and convincing evidence of the allegation you claim could only have come from a confidential source, is cited at length in the complaint. *Id.* Facebook elected *not* to move to seal this testimony in the Six4Three action.

Our client is entitled to plead its claims with specificity and your attempt to intimidate and prevent our client from doing so is not well taken. This is particularly necessary in light of Facebook’s consistent arguments before the Court in the Six4Three action. Since April 2015, Facebook has contended that Six4Three has failed to plead its claims with any of the requisite particularity to survive demurrer. For instance, in the Ancillary Defendants’ Demurrer to the 5AC, filed on May 3, 2018, Defendants argued:

Six4Three's fraud claims lack factual support as to the Ancillary Defendants. Starting with concealment, the requirement that fraud must be pleaded with specificity applies equally to a cause of action for fraud and deceit based on concealment. Also, to plead tort liability based on false or incomplete statements, the pleader must set forth at least the substance of those statements. Intentional misrepresentation also must be pleaded with specificity. To meet this requirement, the complaint must plead facts that show how, when, where, to whom, and by what means the representations were tended.... Six4Three fails to allege the elements of fraud--negligent or otherwise--with any specificity. With respect to Mr. Cox, Six4Three alleges that he was indirectly responsible for unidentified misrepresentations to an unidentified audience over the course of six years. There is no specificity as to when, where, to whom, or by what means the alleged misrepresentations were made.... The allegations against Mr. Olivan fare no better. There are no allegations that Mr. Olivan made or directed any specific misrepresentations or omissions at all; rather, Six4Three accuses him, at an unidentified time and place, of directing the Platform team to shut down applications.... Finally, without identifying any specific misrepresentations or concealment, Six4Three accuses both Mr. Vernal and Mr. Sukhar of serving as the "front man" for the scheme. Even if Six4Three could plead specific facts against the Ancillary Defendants individually, Six4Three fails to plead a conspiracy to commit fraud. Six4Three never alleges that the Ancillary Defendants had actual knowledge that a tort was planned and concurred in the plan with knowledge of the unlawful purpose—there is no where, when, or how as



to the Ancillary Defendants supposed agreement to some scheme, let alone specificity as to how they knowingly carried it out together. Ancillary Defendants' Demurrer to the 5AC, filed May 3, 2018, at 13-14 (citations and quotations omitted).

Facebook cannot intimidate my client against alleging violations of law with specificity and then cash the check of that intimidation tactic to prevail on demurrer or motion for summary judgment precisely because my client was prevented from alleging the particularities of the conduct, damage and harm caused by Defendants. This intimidation tactic is far outside the bounds of professional decorum and has no basis in the law.

Thus, regarding your requests: (1) we will not be withdrawing the Styleform Complaint; (2) we have adequately identified all documents relied upon in drafting the Styleform Complaint; and (3) we decline to identify all individuals and entities to whom the public complaint has been distributed.

Very truly yours,

David S. Godkin

DSG:cam

cc: Joshua Lerner, Esq. (By email)
Sonal Mehta, Esq. (By email)
Catherine Kim, Esq. (By email)
Service-Six4Three (By email)
Stuart G. Gross, Esq. (By email)
James E. Kruzer, Esq. (By email)

EXHIBIT 5

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11 Attorneys for Plaintiff,
SIX4THREE, LLC, a Delaware
12 limited liability company

13
14 SUPERIOR COURT OF CALIFORNIA

15 COUNTY OF SAN MATEO

16 SIX4THREE, LLC, a Delaware limited
17 liability company,

18 Plaintiff,

19 v.

20 FACEBOOK, INC., et al.,

21 Defendants.

) Case No. CIV 533328
)
)

) **Assigned for all purposes to Hon. V.**
) **Raymond Swope, Dept. 23**
)

) **PLAINTIFF'S RESPONSE TO**
) **DEFENDANTS' NOVEMBER 26, 2018**
) **EX PARTE APPLICATION FOR**
) **SANCTIONS**
)

22 Department: 23
Judge: Honorable V. Raymond Swope
23 Filing Date: April 10, 2015
Trial Date: April 25, 2019

1 allegations made in the Fifth Amended Complaint—a public document—to draft the Styleform
2 Complaint. Thus, Defendants’ allegations that Plaintiffs’ counsel based the Styleform
3 Complaint on confidential documents is simply incorrect.

4 **II. All of the Alleged Violations of the Protective Order Rely on Information in the**
5 **Public Domain**

6 Defendants allege that Plaintiff’s counsel “inappropriately drafted the Styleform
7 Complaint that, while mischaracterizing Facebook’s confidential documents, improperly relies
8 on them nonetheless” in “direct violation” of the Protective Order. *Ex Parte* Application, at 6.
9 Not so. Because the Styleform Complaint is substantively a copy of the Fifth Amended
10 Complaint—and the Fifth Amended Complaint is a public document—each allegation that
11 Defendants contend could *only* have come from information subject to the Protective Order, in
12 fact has a public source. Indeed, were it otherwise, Defendants would surely have moved to seal
13 the Fifth Amended Complaint, but never have done so. Thus, Defendants contention that only a
14 party privy to their confidential information could have drafted the Styleform Complaint is
15 incorrect. That party could have done so based on the Fifth Amended Complaint.

16 **A. Alleged Violation #1: Allegations Pertaining to Tinder**

17 Defendants first contend that Styleform’s allegation that “Tinder provided highly
18 valuable unrelated financial consideration, including intellectual property, to Facebook in
19 exchange for its special access to APIs.” *Ex Parte* Application, at 6. Defendants contend that
20 “nothing in the public domain addresses this alleged transfer of intellectual property from
21 Tinder to Facebook as consideration for special access to APIs—because no such transfer ever
22 occurred.” *Id.* This is not so. As alleged in the Fifth Amended Complaint, this comes from *The*
23 *Wall Street Journal*:

24 *The Wall Street Journal* also reported in the same article that Facebook reached
25 an unspecified compromise with dating app Tinder that permitted some form of
26 access to photos of mutual friends. Upon information and belief, Tinder provided
highly valuable unrelated financial consideration to Facebook in exchange for
this special access to data.

27 Godkin Dec., ¶ 3, Ex. 2 (Fifth Amended Complaint, ¶ 167). Indeed, *The Wall Street Journal*’s
28 reporting of Tinder’s special deal with Facebook was published on September 21, 2015, more

1 than three years ago.¹ The 5AC further states that "Developers were required to share their
2 source code and other *confidential intellectual property* with Facebook at Facebook's request"
3 and that "the companies who were offered special, whitelist access to the privatized Graph API
4 Data were ones who either agreed to purchase hundreds of thousands of dollars in unrelated
5 mobile ads, were friends of Zuckerberg, Sandberg or other Facebook executives, or provided
6 other valuable consideration, *such as intellectual property or data*, to Facebook." Godkin Dec.,
7 ¶ 3, Ex. 2 (Fifth Amended Complaint, ¶¶ 6, 167) (emphasis added).

8 **B. Alleged Violation #2: Facebook's Public Relations Firm**

9 Defendants next contend Styleform's allegation that Facebook paid a public relations
10 firm to "disseminate this fraudulent pro-privacy narrative" relies on confidential materials to
11 mischaracterize the PR firm's work for Facebook. Defendants' November 26th *Ex Parte*
12 Application for Expedited Relief, at 7. Again, the Fifth Amended Complaint undermines
13 Defendants' accusation: "Zuckerberg and the Conspiring Facebook Executives directed their
14 public relations team *to feed reporters false information* and in certain cases drafted reporters'
15 stories themselves in order *to disseminate this fabricated narrative* among the public and
16 Developer community." Godkin Dec., ¶ 3, Ex. 2 (Fifth Amended Complaint, ¶ 129) (emphasis
17 added).

18 **C. Alleged Violation #3: Facebook's Public Relations Firm**

19 Defendants also contend that confidential information is the "only possible source" for
20 Styleform's allegation that Facebook executives stopped providing a level competitive playing
21 field for developers in 2009, but concealed this decision from them. Defendants' November 26th
22 *Ex Parte* Application for Expedited Relief, at 7; Godkin Dec., ¶ 2, Ex. 1 (Styleform Complaint ¶
23 7). To conclude that confidential information is the "only possible source" for this allegation
24 ignores numerous allegations in the Fifth Amended Complaint. The complaint alleges
25 repeatedly that Defendants failed to operate "a level competitive playing field" and "made and
26 directed Facebook employees to make false statements and to maliciously suppress material

27
28 ¹ See <https://www.wsj.com/articles/facebooks-restrictions-on-user-data-cast-a-long-shadow-1442881332>.

facts from at least 2009 through 2015.” Godkin Dec., ¶ 3, Ex. 2 (Fifth Amended Complaint, ¶¶ 24-27). Further, the Fifth Amended Complaint cites a number of material misrepresentations specifically from 2009 as evidence of this claim. Godkin Dec., ¶ 3, Ex. 2 (Fifth Amended Complaint, ¶¶ 63-64, 102).

Moreover, Styleform cites public testimony from the deposition of Ali Partovi in the Six4Three action as evidence of this allegation that Defendants claim can only have been generated from a confidential source. Godkin Dec., ¶ 2, Ex. 1 (Styleform Complaint ¶¶ 95-96). Partovi testifies that “Facebook’s senior executive in charge of Platform told him in a meeting in 2009 that if iLike did not sell to Facebook for a price much lower than its market value at the time, then Facebook would shut iLike down and destroy its business.” *Id.* Partovi’s testimony is quoted at length in the complaint. *Id.* Defendants elected not to move to seal this testimony in the Six4Three action, resulting in the testimony showing up in the Fifth Amended Complaint and then the Styleform Complaint.

III. Styleform Has a Fundamental Interest in Its Choice of Counsel and Defendants Seek to Improperly Prevent It from Being Represented Six4Three’s Counsel

All of the allegations in the Styleform Complaint that Defendants claims are violatory also show up in the Fifth Amended Complaint, which, because of its public character, any person could copy and file a copycat version. Thus, Defendants are effectively arguing for a novel *fruit-of-the-poisoned* tree rule, under which a party who produces confidential information in a lawsuit can—virtually indefinitely thereafter—disqualify the attorney representing their adversary in that lawsuit from representing any other party in a similar action in the future. While the potential attractiveness of this rule to the defense bar is obvious, it is not one for which there is any support and, more importantly, it runs directly contrary to the fundamental right of litigants’ to select their own attorney. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 442 (1985) (“Everyone must agree that the litigant’s freedom to choose his own lawyer in a civil case is a fundamental right.”) (*J. Stevens Dissenting*). Accordingly, Defendants’ effort to effect this result here must be denied.